APPENDIX A

[Filed Jan. 10, 1995]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-4128
93-4134

J. GARY SHEETS,
Plaintiff-Appellee,
vs.

SALT LAKE COUNTY, a governmental subdivision of the State of Utah; and MICHAEL GEORGE, individually and as Salt Lake County Investigator,
Defendants-Appellants.

Appeals from the United States District Court
for the District of Utah
(D.C. No. 89-C-676-J)

Before KELLY, and HENRY, Circuit Judges, and VAN BEBBER, District Judge.*

KELLY, Circuit Judge.

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* The Honorable G.T. Van Bebber, United States District Judge for the District of Kansas, sitting by designation.

In No. 93-4134, Defendants-Appellants, Salt Lake County and Michael George, appeal a $650,000 judgment on a jury verdict and in No. 93-4128, they appeal a $77,896.93 judgment for attorney's fees entered against them. They contend that the district court erred by (1) refusing to hold Plaintiff's 42 U.S.C. § 1983 action time-barred under Utah Code Ann. § 78-12-28(3), (2) denying Defendants' motion to dismiss and motion for judgment as a matter of law, (3) refusing to admit into evidence two books and newspaper articles, (4) denying Defendants' motion for remittitur, (5) denying Defendants' motion for new trial, and (6) granting the Plaintiff unreasonable attorney's fees. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

Background

On October 15, 1985, two bombs exploded in Salt Lake City. One killed Steve Christensen, a former employee and executive of Coordinated Financial Services ("CFS"). The other killed Kathy Sheets, the wife of Gary Sheets, chairman of the board and president of CFS. These events generated a great deal of media interest.

A few weeks after Kathy Sheets' death, the police asked Gary Sheets for a copy of his wife's diary. According to Salt Lake City Detective Jim Bell, this was a common practice. Aplee. App. at 144. Gary Sheets read his wife's diary. Believing that the diary would remain confidential, Gary Sheets voluntarily turned the diary over to Detective Bell. Detective Bell testified that he could not recall whether he had assured Mr. Sheets the contents of the diary would remain confidential. Aplt. App. at 115. Salt Lake City Detective Ken Farnsworth testified, however, that he had told Mr. Sheets that the diary would remain confidential and communicated this message orally to those working on the case. Aplt. App. at 187; 193.

Copies of the diary were distributed to the investigators and detectives assigned to the case, one of whom was the Defendant, Salt Lake County Investigator Michael George. At trial, Mr. George testified that he reviewed the diary, photocopied certain excerpts, and made thorough notes of the diary's entries for his files.

In January 1987, Mark Hoffman pleaded guilty to the murders of Steve Christensen and Kathy Sheets. Once Mr. Hoffman was sentenced to prison, the criminal investigation of the bombings ended. The investigative file, including the diary, was then archived, making it available for public inspection.

At that time, the Salt Lake County Attorney's Office had an unwritten policy that permitted its employees to speak to members of the press about their cases once an investigation closed, as long as the officers treated members of the press in an evenhanded fashion. Aplt. App. at 131. Pursuant to this policy, Mr. George met with three people who were writing books about the Hoffman murders, including his good friend Robert Lindsey. When he met with Mr. Lindsey, he allowed him to examine his file box of notes. Mr. George testified that this box may well have contained the photocopies and handwritten notes he had taken from the diary. By contrast, Mr. George did not provide the other authors with access to his files. Instead, those authors asked him questions and he responded, often referring to his notes. Mr. George destroyed his note files before the publication of Mr. Lindsey's book.

All three authors published books about the Hoffman murders. Mr. Lindsey's book was the only one, however, to contain direct quotations from Kathy Sheet's diary. On June 2, 1989, Mr. Sheets filed suit against Salt Lake County and various prosecutors and police officers asserting state and federal violations, including a claim for constitutional invasion of privacy. On December 4, 1990, Mr. Sheets amended his complaint to add a § 1983

claim against the County, Mr. George, and Salt Lake County Attorney Theodore Cannon. Only Mr. George and the County remained as Defendants throughout the trial. At the close of the Plaintiff's case, Defendants moved to dismiss, in reality a motion for judgment as a matter of law, Fed. R. Civ. P. 50(a), which the district court denied.

Defendants then put on their case, and sought to offer into evidence excerpts from the other authors' books as well as newspaper articles about Kathy and Gary Sheets. The Plaintiff objected to admissions of these exhibits on grounds that they were irrelevant. The district court sustained the objection, but excluded the evidence on grounds of lack of foundation. At the close of all the evidence, Defendants moved for judgment as a matter of law. *Id.*; Aplt. App. at 341.

The jury returned a verdict of $650,000 in favor of Mr. Sheets. Defendants then filed motions for judgment as a matter of law, Fed. R. Civ. P. 50(b), new trial, and remittitur. Aplt. App. at 81-82. The district court denied each of these post-trial motions.

Plaintiff subsequently filed a motion for attorney's fees and other costs. Defendants filed objections, and the district court entered an order awarding Mr. Sheets $77,896.93 in attorney's fees.

Discussion

I. Statute of Limitations

Defendants initially contend that the district court erred by refusing to bar Mr. Sheets' § 1983 action under the two-year statute of limitations contained in Utah Code Ann. § 78-12-28(3), which purports to apply specifically to § 1983 actions. We have previously held, however, that in enacting Utah Code Ann. § 78-12-28(3), the Utah legislature exceeded its authority and as such this section is invalid. *Arnold v. Duchesne County*, 26 F.3d

982, 989 (10th Cir. 1994), *petition for cert. filed,* 63 U.S.L.W. 3161 (Aug. 25, 1994) (No. 94-358). Instead, a four-year statute of limitations under Utah Code Ann. § 78-12-35(3) governs § 1983 actions. *See id.* at 985. Since Mr. Lindsey's book was published in August 1988, and Mr. Sheets filed suit within four years of this date, Mr. Sheets' § 1983 claim was not barred under the applicable statute of limitations.

II. Denial of Motions for Judgment as a Matter of Law

Defendants claim that the district court erred by denying their motions for judgment as a matter of law. We review *de novo* the district court's denial of Defendants' motions for judgment as a matter of law. *See F.D.I.C. v. United Pacific Ins. Co.,* 20 F.3d 1070, 1079 (10th Cir. 1994). To overturn the denial, "we must conclude that 'viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party.'" *Id.* (quoting *Mitchell v. Mobil Oil Corp.,* 896 F.2d 463, 467 (10th Cir.), *cert. denied,* 498 U.S. 898 (1990)).

Defendants first argue that Mr. Sheets had no legitimate expectation of privacy in his wife's diary, claiming that he gave it to the authorities without any restrictions on its use. They further argue that the Plaintiff produced insuffiicent evidence of proximate cause to warrant submission of the issue to the jury and insufficient evidence for the jury to conclude that Mr. George intentionally violated Mr. Sheets' right of privacy. We disagree.

A. Expectation of Privacy

Cases involving the constitutional right of privacy address two distinct interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S.

589, 599-600 (1977). Here, we are concerned only with the former of these interests. We have held that "[d]ue process . . . implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state." *Mangels v. Pena,* 789 F.2d 836, 839 (10th Cir. 1986).

Information falls within the ambit of constitutional protection when an individual has a "legtimiate expectation . . . that it will remain confidential while in the state's possession." *Id.* The legitimacy of this exception depends, "at least in part, upon the intimate or otherwise personal nature of the material which the state possesses." *Id.* If an individual has a legitimate expectation of confidentiality, then "[d]isclosure of such information must advance a compelling state interest which, in addition, must be accomplished in the least intrusive manner." *Id.* (citing *Denver Policemen's Protective Assoc. v. Lichtenstein,* 660 F.2d 432, 435 (10th Cir. 1981)). Defendants do not contend that there was any compelling state interest in warranting disclosure and we believe that whether the diary was to be kept confidential as well as whether the material is sufficiently personal to be subject to protection were questions for the jury to resolve based upon the evidence.

Defendants have mischaracterized the issue. Plaintiff does not claim an interest in avoiding disclosure of his deceased wife's general feelings and thoughts, rather he claims an interest in avoiding disclosure of things personal to him, such as his wife's written perceptions of their marriage. Upon review of Mrs. Sheets' diary and the record, a jury could easily find that the diary contained information about Mr. Sheets that only a spouse would know and that such information was both intimate and personal to Mr. Sheets. Moreover, Mr. Sheets' and Detective Farnsworth's testimony that both parties considered the diary to be confidential, leads us to conclude that there was ample evidence for a jury to con-

clude that Mr. Sheets legitimately expected his wife's diary to remain confidential while in the hands of the police. *See* Aplt. App. at 187-88; 229.

The fact that Mr. Sheets did not author the information does not prohibit him from having a distinct privacy interest in the dissemination of information written about the personal aspects of his life. *See Nixon v. Administrator of General Services,* 433 U.S. 425, 458 (1977) ("This expectation is independent of the question of ownership of the materials . . . ."). Our analysis of one's expectation of privacy in this area focuses upon the nature of the material opened to public view, *see Nilson v. Layton City,* No. 94-4077, 1995 WL 3759, slip op. at 5-6 (10th Cir. January 6, 1995), not on the individual who penned the pages on which this information appears.

Arguably, the information is not extremely sensitive in nature, in other words, the facts revealed in the diary about Mr. Sheets are not particularly controversial or embarrassing. However, information need not be embarrasing to be personal and whether it is sufficiently personal to be protected is, in this case, a legitimate question for the jury. We find that information conveyed to one's spouse or that one's spouse has observed about one's character, marriage, finances, and business to be personal in nature and subject to a reasonable expectation of privacy.[1] Mrs. Sheets' diary entries about her husband and their marital relationship are certainly as personal as medical and certain financial records, which courts have placed within the ambit of constitutional protec-

[1] Though the common law tort of invasion of privacy does not control the federal constitutional claim, we find that the tort, as defined by § 652D of the Restatement, provides some guidance as to what constitutes a reasonable expectation of privacy. Accordingly, we note that the information revealed from Kathy Sheets' diary did not involve a matter of public concern, and its public disclosure could be considered highly offensive to the reasonable person. *See Restatement (Second) of Torts* § 652D (1977).

tion. *See United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (medical records); *Fraternal Order of Police, Lodge 5 v. Philadelphia*, 812 F.2d 105, 115 (3d Cir. 1987) (financial records).

The fact that Detective Bell could not recall whether he had initially assured Mr. Sheets of the diary's confidentiality does not negate both Mr. Sheets and Detective Farnsworth's testimony that an understanding of confidentiality did exist. In addition, the very nature of the item—a diary, a place traditionally reserved for the recording of private thoughts—which was given to the police for the specific purpose of aiding their investigation, bolsters Mr. Sheets' claim that he expected the item to remain confidential.

Defendants contend that Mr. Sheets could not have expected the diary to remain confidential, considering the many investigators who had access to the diary. Defendants gloss over a crucial point. To turn a diary over to a limited group for what one perceives to be a limited and proper purpose is quite different than inviting publication of the material.

Finally, although this point is conceded by Defendants, we find no compelling state interest in Mr. George's disclosure of the diary excerpts to Mr. Lindsey. We have found, for example, "compelling state interest" in the disclosure of confidential statements police officers made for investigative files. *See Lichtenstein*, 660 F.2d at 436. The files in *Lichtenstein* were discoverable because the state's interest in ascertaining the truth in a criminal proceeding in addition to defendants' rights to exculpatory evidence outweighed the officers' legitimate expectation of privacy in the files. *Id.* In this case, Defendants have supplied no such compelling interest in the dissemination of Mrs. Sheets' diary to Mr. Lindsey.

B. Proximate Cause

Defendants also claim that Mr. Sheets failed to establish Mr. George as the proximate cause of Mr. Sheets' injury. We again must disagree. After hearing the evidence at trial, the jury concluded that Mr. George was responsible for disseminating the diary excerpts to Mr. Lindsey. Nonetheless, Defendants claim that there was insufficient evidence adduced at trial to hold Mr. George accountable as the proximate cause of Mr. Sheets' privacy violation.

We have held if "competent evidence [is] introduced, even though conflicting, the question[] of . . . proximate cause must be left to the jury." *Key v. Liquid Energy Corp.*, 906 F.2d 500, 505 (10th Cir. 1990). Mr. Lindsey testified that there were three possible sources of the diary information: Detectives Farnsworth, Cannon, and George. Mr. Farnsworth denied giving the information to Mr. Lindsey. Mr. Cannon testified that he did not have a copy of the diary nor did he keep meticulous notes based on the diary. Mr. George, on the other hand, testified that he made photocopies and took exact notes from the diary, that he kept these excerpts in his files, that he was very good friends with Robert Lindsey, and that he let Mr. Lindsey look through his files. We deem this to be ample evidence for a jury to conclude that Mr. George proximately caused the invasion of Mr. Sheets' privacy.

Defendants additionally claim that Mr. George cannot be considered the proximate cause of Mr. Sheets' § 1983 violation because he did not intentionally cause Mr. Lindsey to use the diary excerpts in the book. Defendants misconstrue the meaning of proximate cause. A defendant is the proximate cause of a plaintiff's injury if the injury a natural consequence of defendant's actions. *Id.* Since the jury surmised that Mr. George was responsible for disseminating the informattoion to Mr.

Lindsey, Mr. George was indeed the proximate cause of Mr. Sheets' injury.

C. Insufficient Evidence of Intentional Conduct

Defendants contend that the Plaintiff failed to prove that Mr. George intentionally violated his constitutional right, as required by the court's instruction to the jury. According to Defendants, Plaintiff established mere negligence. We disagree.

The district court instructed the jury to find that Defendants violated Plaintiff's constitutional right to privacy only if Mr. George "intentionally committed the acts which violated Plaintiff's constitutional right." *See* Aplee. Supp. App. at 172. The court further instructed that "specific intent to deprive Plaintiff of a constitutional right" is not necessary; instead, "it is sufficient if Plaintiff can prove that a Defendant intentionally committed the acts which resulted in the violation of Plaintiff's constitutional right." *Id.* Defendants did not object to these jury instructions, and they are not at issue. Viewing the evidence and all reasonable inferences in favor of the verdict, as we must, see *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 612-13 (10th Cir. 1984), we find that sufficient evidence was proffered at trial for the jury to conclude that Mr. George intentionally, as opposed to negligently, disclosed the diary information to Mr. Lindsey.

Defendants advanced several additional arguments to the district court in support of their motion to dismiss, including that Mr. Sheets was a public figure both as a result of his position in the Mormon Church as well as a result of a federal prosecution for which he was acquitted. In this appeal, however, Defendants only briefed and argued that the lower court erred "because plaintiff had no reasonable expectation of privacy in his murdered wife's diary which he gave to the Salt Lake City Police Department without any restrictions . . . and because

plaintiff had insufficient evidence of proximate cause to warrant submission to the jury." Aplt. Br. at 22. Although we are not persuaded by any of the points presented to the district court, a party who chooses not to brief a particular point, ordinarily is deemed to have waived the contention on appeal. *McKinsey v. Sentry Inc.*, 986 F.2d 401, 407 (10th Cir. 1993); *Bledsoe v. Garcia*, 742 F.2d 1237, 1244 (10th Cir. 1984); *Whitehead v. Silver*, 346 F.2d 207, 209 n.2 (10th Cir. 1965).

For the foregoing reasons, we affirm the district court's denial of Defendants' motions for judgment as a matter of law.

III. Admission of Evidence

Defendants claim that the trial court erred by excluding the books and newspaper articles Defendants tried to introduce into evidence. "A district court possesses considerable discretion in governing the presentation of evidence, and its decisions will not be disturbed absent manifest injustice to the parties" and clear abuse of discretion. *Comcoa, Inc. v. NEC Tels., Inc.*, 931 F.2d 655, 663 (10th Cir. 1991); *Orth v. Emerson Elec. Co.*, 980 F.2d 632, 639 (10th Cir. 1992).

When Defendants sought to introduce excerpts from the other authors' books and various newspaper articles into evidence, the Plaintiff objected on the grounds of relevance. The court sustained the objection, but based the exclusion on lack of foundation. Establishing foundation is the process whereby a proponent of a piece of evidence identifies or authenticates the evidence, usually with the testimony of a witness. *See* Edward W. Cleary, *McCormick on Evidence* § 51, at 123 (3d ed. 1984). Here, the authenticity of the books and articles had been stipulated in the pretrial order. The evidentiary foundation for these documents was thus established. Consequently, the district court erred by excluding the evidence for lack of foundation.

The district court was correct, however, in sustaining the Plaintiff's objection. Defendants failed to connect the books and the newspaper articles to Mrs. Sheets diary. *See* Fed. R. Evid. 402. Hence, they did not establish the evidence's relevance nor a basis for its admission. Therefore, the court's only error was basing the exclusion on lack of foundation, instead of relevance. We may affirm the district court's evidentiary ruling, despite the fact its conclusion was based on incorrect grounds. *See In re Slack-Horner Foundries Co.*, 971 F.2d 577, 579-80 (10th Cir. 1992) (" '[T]rial court's decision will be affirmed if the record reveals another ground which supports the decision.' ") (quoting *Scivally v. Time Ins. Co.*, 724 F.2d 101, 103 (10th Cir. 1983)). Because we find grounds to support the district court's exclusion of this evidence, we affirm its evidentiary ruling.

IV. Remittitur

Defendants claim that the trial court erred by failing to grant their motion for remittitur. The trial court's denial of a motion for remittitur is entitled to considerable deference on appeal. We will not disturb this determination absent a gross abuse of discretion. *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987). We will only find an abuse of discretion if the jury award is " 'so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or another improper cause invaded the trial . . . .' " *Id.* (quoting *Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir. 1962)). Because determination of damages is traditionally a jury function, *Whitley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983), and the jury's award of $650,000 does not shock our conscience, we affirm the trial court's denial of remittitur.

V. New Trial

Defendants claim that the district court erred by denying their motion for new trial. We review the district

court's denial of defendants' motion for new trial for abuse of discretion. *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993). We will reverse the denial of a motion for a new trial only if the trial court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* Defendants have wholly failed to establish any bases for a new trial. Hence, we affirm the district court's denial of defendants' motion for new trial.

VI. Attorney's Fees

Defendants claim that the district court's award of attorney's fees was unreasonable. We review the district court's award of attorney's fees to the plaintiff for abuse of discretion. *Post Office v. Portec, Inc.*, 913 F.2d 802, 811 (10th Cir. 1990). We will find the underlying factual findings reversible only if they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986).

Plaintiff has the burden of proving in the first instance the extent and reasonableness of requested attorney's fees with meticulous and contemporaneous time records. *See Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986). This was done, and the district court made the adjustments it deemed appropriate. Indeed, having seen the work of these attorneys, the district court is in a unique position to determine an appropriate fee. This is especially true in the absence of any evidence to the contrary. Defendants failed to proffer any evidence that the rates or hours claimed by Mr. Sheets' attorneys or the court's adjustments were unreasonable. Defendants simply argue that the fees were duplicative and exorbitant in nature. Because Defendants have failed to substantiate these allegations with evidence or otherwise, they waived their right to an evidentiary hearing and consequently may not now challenge the district court's determination that the number of hours expended were

reasonable. *See Blum v. Stenson,* 465 U.S. 886, 892 n.5 (1984).

Defendants also claim that the district court abused its discretion by halving the amount Plaintiff's counsel charged, since this total included time spent on the case not directly involving Mr. George and Salt Lake County. We find, however, the court's determination to be reasonable. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). Hence, we affirm the district court's award of $77,896.33 in attorney's fees.

AFFIRMED.

APPENDIX B

[Filed May 10, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 89-C-676J

GARY SHEETS,

Plaintiff,

vs.

ROBERT LINDSEY, SIMON & SCHUSTER, INC., a corporation, SALT LAKE COUNTY, a governmental subdivision of the State of Utah, THEODORE L. CANNON, individually and as Salt Lake County Attorney, and MICHAEL GEORGE, individually and as a Salt Lake County Investigator,

Defendants.

OPINION AND ORDER

I. INTRODUCTION

On January 29, 1991, the court heard argument on a Motion to Dismiss filed by defendant Salt Lake County (the "County"). The County argued that plaintiff's 42 U.S.C. § 1983 (1981) claims were barred by the applicable statute of limitations. On May 2, the court heard argument on a second Motion to Dismiss filed by defendant Michael George ("George"). George joined the County's Motion to Dismiss, similarly arguing that plaintiff's § 1983 claims were time barred. The court took the Motions under advisement. Having since care-

fully considered the memoranda and arguments of counsel, and for the reasons set forth below, the court hereby DENIES defendants' Motion to Dismiss.

II. FACTS

In August of 1988, defendant Simon and Schuster published a book entitled "A Gathering of Saints" (the "book"). The book, which was written by defendant Robert Lindsey ("Lindsey"), contained portions of a diary written by plaintiff's deceased wife. On July 31, 1989, plaintiff filed the above captioned case claiming defendants Simon and Schuster and Lindsey had unreasonably invaded plaintiff's privacy by publishing portions of the diary. On December 5, 1990, over two years after the book was published, plaintiff filed an Amended Complaint naming the County and George (collectively "defendants") as additional defendants to this action. Plaintiff's claims against defendants likewise arise out of the August, 1988, publication of the book.

This case is currently before the court on defendants' Motions to Dismiss plaintiff's § 1983 claims against them. Defendants argue that such claims are barred by the two-year statute of limitations found in Utah Code Ann. ("U.C.A.") § 78-12-28(3) (1987).[1] In contrast, plaintiff contends that the four-year residual statute of limitations found in U.C.A. § 78-12-25(2) (1987) applies to § 1983 actions filed in the State of Utah, and therefore his civil rights claims against defendants were timely.[2]

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[1] Utah Code Ann. § 78-12-28(3) provides that an action "for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983" must be filed within two years.

[2] Some states have a "general" statute of limitations provision which applies to all personal injury actions with certain specific exceptions. Other states have a "residual" provision which applies to all actions not otherwise provided for, including personal injury actions. *See e.g.*, U.C.A. § 78-12-25(2) (An action for relief not otherwise provided for by law must be brought within four years.)

III. DISCUSSION

This court must select which state statute of limitations provision governs § 1983 actions filed in federal court in the State of Utah.[3] Section 1983 itself does not contain a specific statute of limitations. Therefore, because Congress has not established a time period in which a cause of action may be brought under § 1983, the settled practice is to adopt a local provision as federal law. *See Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980).

In 42 U.S.C. § 1988 (1981), Congress specifically endorsed the borrowing of state-law limitations for purposes of civil rights actions when federal law is deficient. A state statute will only be adopted, however, if it "is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988.[4] Because § 1988 does not

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[3] Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[4] Section 1988 provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause

offer any guidance as to which state provision to borrow, the U.S. Supreme Court has directed courts to select the state statute of limitations "most analogous", *Board of Regents*, 446 U.S. at 488, and "most appropriate", *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975), to the particular § 1983 action. Federal courts are bound by a state's construction of its own statute of limitations, but it is a question of federal law whether a particular state statute is applicable to a federal claim. *See Wilson v. Garcia*, 471 U.S. 261, 269-71 (1985).

The first step in selecting a state statute of limitations for purposes of a federal claim, is to characterize the essential nature of the federal action. *See Wilson*, 471 U.S. at 268. Once a federal action has been characterized, an appropriate state-law analogy may be drawn. The practice of seeking state-law analogies for particular § 1983 claims has bred confusion and inconsistency in the lower courts, and generated time-consuming litigation. *See Owens v. Okure*, 488 U.S. 235, 240 (1989). Some courts have found state-law analogies to § 1983 claims in common-law tort, others in contract law, and still others in statutory law.[5] *Id.* at 241. Because the choice of the statute of limitations depended upon the characterization of the § 1983 action, two or more state limitation provisions could arguably apply to a given claim.

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is held, so far as the same is not inconsistent with the Constitution and laws of the United States . . . .

42 U.S.C. § 1988 (1981).

[5] Almost every § 1983 claim can be favorably analogize to more than one common-law form of action. To name a few, § 1983 has been allege to encompass: "discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to heard . . . ." *Wilson*, 471 U.S. at 273 (Footnotes omitted.)

In *Wilson*, 471 U.S. at 261, the Supreme Court sought to end the confusion over which state-law analogy most appropriately characterized the essential nature of a § 1983 claim. The Court held that the legislative history of § 1983 and the wide array of claims embraced by that provision confers a general remedy for "injuries to personal rights". *Wilson*, 471 U.S. at 280. Therefore, because § 1983 claims are best characterized as personal injury actions, the Court held that a state's personal injury statute of limitations should be applied to *all* § 1983 actions. *Id.*

In states with a single statute of limitations for personal injury claims, *Wilson* eliminated the confusion over which limitations provision a court should borrow for purposes of § 1983. Questions continued to arise, however, in states with multiple personal injury limitations provisions. Accordingly, in *Owens v. Okure*, 488 U.S. 235, 249-50, the Court supplemented *Wilson*,[6] and held that in states with multiple limitations periods for personal injury actions, federal courts should borrow a state's general or residual statute of limitations. *Id.* Because a general or residual statute of limitations is easily identifiable by language or application, the Court noted that a party to a § 1983 action could readily ascertain the applicable limitations period. *Id.* 248-49.

The Utah legislature has enacted multiple statutes of limitations governing personal injury actions. *See e.g.*, U.C.A. § 78-12-28(2) (1987) (two years for death caused by wrongful action or neglect); U.C.A. § 78-112-29(4) (Supp. 1988) (one year for libel, slander, assault, battery, false imprisonment, or seduction). Plaintiffs

[6] The Court's decision in *Owens* was intended to eliminate any confusion unaddressed by *Wilson*. "Our decision in *Wilson* promised an end to the confusion over what statute of limitations to apply to § 1983 actions; with today's decision, we hope to fulfill *Wilson's* promise." *Owens*, 488 U.S. at 251.

therefore assert that, because Utah has more than one limitations provisions governing personal injury claims, the court should apply the state's residual statute of limitations. The court agrees. To avoid confusion as to which personal injury statutes of limitations applies to a § 1983 action filed in Utah, the four-year limitations provision found in U.C.A. § 78-12-25(2) should govern *all* § 1983 actions. Accordingly, the court finds that plaintiff's Amended Complaint, filed on December 5, 1990, naming the County and George as defendants to an action which arose in August of 1988, came well within the four-year statute of limitations found in U.C.A. § 78-12-25(2).

While *Owens* would seem dispositive of the question as to which state statute of limitations applies to § 1983 actions, the Utah legislature has created additional confusion by enacting a statute of limitations provision which specifically addresses civil rights claims. Utah Code Ann. § 78-12-28(3) provides that an action "for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983" must be filed within two years. Defendants contend that because U.C.A. § 78-12-28(3) specifically addresses § 1983 claims, *Owens* is inapposite to the case at bar. They argue that because U.C.A. § 78-12-28(3) eliminates the confusion over which of Utah's personal injury limitations provisions applies to § 1983 actions, this court need not content itself with Utah's residual statute of limitations.

The court begins its analysis of U.C.A. § 78-12-28(3) by first noting that the applicability of this provision to § 1983 actions filed in federal court in the State of Utah is one of first impression. As discussed above, Congress failed to provide a statute of limitations for suits brought under § 1983. Therefore, the court must borrow the Utah State statute of limitations provision most analogous and most appropriate to plaintiff's § 1983 action, so long as the chosen limitations period is not inconsistent with federal law and policy. 42 U.S.C. § 1988.

The requirement that a state statute be both analogous and appropriate, as well as consistent with federal law and policy, emphasizes the predominance of the federal interest in the borrowing process, taken as a whole.[7] *See Wilson*, 471 U.S. at 269. In *Occidental Life Ins. Co. of California*, 432 U.S. 355 (1977), the Court stated the reasons for carefully scrutinizing the borrowed state statute. Because "State legislatures do not devise their limitations periods with national interests in mind," the Court noted that "it is the duty of the federal courts to assure that the importance of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life*, 432 U.S. at 367.

Section 1983 provides a federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation. *See Wilson*, 471 U.S. at 271-72. The purposes of § 1983 are several fold: to override certain kinds of state laws; to provide a remedy where state law is inadequate; to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice; and to provide a remedy in the federal courts supplementary to any remedy any state might have.[8] *See McNeese v. Board*

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[7] In *Wilson*, the Court noted that:

> The importance of the policies and purposes of the States on matters of civil rights is not the primary office of the borrowing provision in § 1988; rather, the statute is designed to assure that neutral rules of decision will be available to enforce the civil right actions, among them § 1983. Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.

Wilson, 471 U.S. at 269.

[8] The genesis of the Civil Rights Act of 1871 was the campaign of violence and deception in the South fueled by the Ku Klux Klan. The debates on the Act chronicle the insecurity of life, liberty, and property in the Southern States: "Immunity is

of Education, 373 U.S. 668, 672 (1963). In sum, § 1983 provides the means to preserve and enforce the Constitutional rights, privileges and immunities granted to each citizen. The high purposes of this unique remedy make it appropriate to accord the statute a sweep as broad as its language. *See Wilson,* 471 U.S. at 272.

Utah Code Ann. § 78-12-28(3) purports to impose a specific time limitation on all § 1983 claims. In other words, the State of Utah has specifically dictated the time frame in which a federal claimant may vindicate a Constitutional deprivation by persons acting under color of state law. For the reasons set forth below, the court finds that U.C.A. is neither consistent with, nor analogous to, federal law and policy.

Although the federal courts are bound by a state's construction of its own statute of limitations, it is a question of federal law whether a particular state statute is applicable to a federal claim. The power of selecting the most analogous statute of repose from existing state statutes is a federal choice; not a state choice. State statutes of repose relate to state created or state recognized causes of action. A state is within its sphere of power in our federal system of government, as a matter of state policy, when it limits the time within which a state cause of action may be vindicated in state court. In contrast, a federally recognized or federally created cause of action cannot be foreshortened by specific state legislation.[9]

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given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress." *Wilson,* 471 U.S. at 276.

[9] The court is particularly mindful of the policies underlying federalism in the context of § 1983. When the fundamental goal of a federal remedy is to deter future abuses of those acting under color of state law, it is hardly appropriate to permit a state itself to limit the time period in which a claim may be brought against a person acting under color of state law.

The concept is simple. The issue before the court concerns the fundamental principle of federalism; namely the geographic division of power. A state lacks the power to truncate federally created or federally recognized rights. The principles of federalism is the perennial message of both the Constitution and the Civil Rights Act. Whether to diminish a federal created right is simply not a choice for a state to make. By passing U.C.A. § 78-12-28(3), the State of Utah seeks to make a choice that is clearly outside the realm of their Constitutionally created powers. Determining the statute of limitations for a federally creacted cause of action, the court emphasizes, is exclusively a federal choice.

Confusion arises because Congress has not itself made a specific and express choice as to a statute of repose with respect to § 1983. Both the higher courts and Congress mandate that this court choose the most analogous state statute to the federal action. Accordingly, the court finds that U.C.A. § 78-12-28(3) not only impermissible intrudes into the federal sphere, it is not the most analogous state statute with respect to a § 1983 action. The Utah statute does not even purport to deal with similar state created or recognized state causes of action. By its express language, the provision deals solely with § 1983 civil rights actions.

As set forth in *Owens*, the court finds that the most analogous statute of limitations with respect to § 1983, is the residual statute of limitations found in U.C.A. § 78-12-25(2). The residual statute of limitations is broad, not selective, and thus may legitimately be used as a guide for a federal choice.[10] Therefore, for the reasons set forth

[10] The court is further troubled by a state law enacted for the sole purpose of limiting the time period in which a § 1983 claim may be brought. Such a statute may well be motivated by a legislative desire to limit the liability of persons acting under color of state law. In contrast, the court believes that the enactment of a state general or residual statute of limitations is not

herein, to apply U.C.A. § 78-12-25(2) to plaintiff's § 1983 claims is the federal choice this court makes.

Defendants' Motions to Dismiss must therefore be DENIED.

IT IS SO ORDERED.

Dated this 10 day of May, 1991.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
Chief Judge
United States District Court

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likely to be motivated by a legislative desire to limit the liability of its officers or employees.

APPENDIX C

[Filed Jul 15, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 89-C-676J

GARY SHEETS,

vs. *Plaintiff,*

SALT LAKE COUNTY, a governmental subdivision of the State of Utah, and MICHAEL GEORGE, individually and as Salt Lake County Investigator,

Defendants.

ORDER

The above-captioned action came on for hearing before this Court on June 21, 1993, on defendants' Motion for Judgment as a Matter of Law, Motion for New Trial and Motion for Remittitur. Having reviewed the memoranda filed herein, and having heard and considered the arguments of counsel, and for the reasons more particularly explicated on the record in open court,

IT IS ORDERED that defendants' Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(a) is DENIED, the defendants having failed to show that "the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1988).

IT IS FURTHER ORDERED that defendants' Motion for New Trial pursuant to Fed. R. Civ. P. 59(a) is DENIED, the defendants having failed to establish grounds sufficient to warrant a new trial, *e.g.*, that the verdict "is clearly, decidedly, or overwhelmingly against the weight of the evidence," *Black v. Heib's Enterprises, Inc.*, 805 F.2d 360, 363 (10th Cir. 1986); *Prebble v. Brodrick*, 535 F.2d 605, 617 (10th Cir. 1976), that the record is tainted by prejudicial error, *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1148-49 (10th Cir. 1978), that jury passion and prejudice resulted in an excessive damages award, *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), or that substantial justice has not been done. *See Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir. 1972).

IT IS FURTHER ORDERED that defendants' Motion for Remittitur is DENIED by reason of defendants' failure to show that the amount of damages awarded by the jury is "so excessive as to shock the judicial conscience and raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial," *Karns v. Emerson Electric Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987) (quoting *Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir. 1962); *accord, Wulf v. City of Wichita*, 883 F.2d 842, 874 (10th Cir. 1989).

DATED this 15 day of July, 1993.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE J. JENKINS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 89-C-676J

GARY SHEETS,

Plaintiff,

vs.

ROBERT LINDSEY, SIMON & SCHUSTER, INC., a corporation SALT LAKE COUNTY, a governmental subdivision of the State of Utah, THEODORE L. CANNON, individually and as Salt Lake County Attorney, and MICHAEL GEORGE, individually and as a Salt Lake County Investigator,

Defendants.

TRIAL TRANSCRIPT

* * * *

[272] THE COURT: Okay. You have a motion?

MS. MARLOWE: Yes, Your Honor. The defendants move to dismiss for the reason that plaintiff has failed to establish a prima facie case of a violation of a constitutional right to privacy.

It would be our position that plaintiff Sheets had no reasonable expectation of privacy in his wife's diary, that when Kathy Sheets died, she was the victim of a horrible crime, that her life and everything about her went into the public domain, and that thereafter, by reason of Mr. Sheets Indictment and prosecution on the Federal fraud

charges, that he and anything about him, continued to be in the public domain.

So, there is, in 1988, at the time the book was [273] published, that Mr. Sheets and his dead wife were still in the public eye, and that everything—and whatever was published was of legitimate public concern, and it didn't invade the privacy of Mr. Sheets.

Specifically, Your Honor, most of the statements that he objects to, the quotes from the books, deal with the feelings and—of Kathy Sheets. While he may have some copyright interest in the diary, itself, that's separate and distinct from any right of privacy that he might be trying to allege in this lawsuit.

I think the law is clear, that he absolutely has no standing to complain about the invasion of any feelings of fear or feelings—complaints about money or fear of loss of money by Kathy Sheets. The only thing he can complain about is if his right of privacy is interfered with, and in order for there to be some interference, he has to have been held up to public ridicule or have been somehow, you know, defamed in the public eye, and there is just absolutely nothing contained in those diary excerpts that holds Mr. Sheets up to, you know, to public defamation or to—I mean, he is not at all hurt in the public eye.

The second part of our motion is that the fact that plaintiffs have absolutely no evidence that my clients were the proximate cause of this leak to Mr. Lindsey, that all they have been able to adduce is that Mr. Lindsey says, "I [274] don't know what the source is. It was some detective, according to what I told my attorney for the publisher. It was some detectives."

He doesn't know which detectives it might have been. He says its could have been any one of seven. At a later time, he says its could have been one of three, but in order to prevail or move forward on this 1983 case, plaintiff must have proximate cause of injury to his privacy interests by reason of the actions of my clients, and he has none.

You know, the issue of—the preponderance of evidence is separate and distinct from whether or not plaintiff has proximate cause to have the jury determine if he should prevail in this lawsuit, and based upon his preponderance of the evidence, we think the Court ought to rule, as a matter of law, there is not sufficient evidence of proximate cause. And the Court also ought to rule, as a matter of law, that based upon the diary excerpts that appeared in Mr. Lindsey's book, that Mr. Sheets' constitutional right to privacy was not invaded by that publication, and that's the basis of our motion, Your Honor.

THE COURT: Okay. Are you relying on any particular case?

MS. MARLOWE: Well, when I first looked at this lawsuit, I was trying to figure out if it was in the nature of some vague privacy case or if it was in the nature of a [275] Fourth Amendment violation. And, let's see. I think there is law out of the Tenth Circuit. There is Layton versus Willingham. It's a complaint by a plaintiff about police who obtained photos of him of a highly sensitive and personal nature. And they disseminated those photographs.

And the Court talks about the constitutional right of privacy and talks—or says that there is no violation of the constitutional right of privacy unless there is a legitimate expectation of privacy in whatever is complained about and the privacy interests outweigh the public need for disclosure. And that's just within the context of this, I think, a criminal investigation.

There is also a case out of the Tenth Circuit. It's Mangel, M-a-n-g-e-l, versus Pena, P-e-n-a, cited in 1986, where the Court, while it involves the public release of a report that talks about drug use by fire fighters, and while it's a due process type of privacy violation alleged in that case, and I believe that, you know, that was probably the state of the law relative to the privacy, you know, right.

But, in any event, the Tenth Circuit said that any limited assurances of confidentiality from officials do not

make a difference in this case. It says because the rights of the substantive due process rights of privacy are not founded upon state provisions but upon deeply rooted notions [276] of fundamental personal interests derived from the constitution, so allegations of the failure of officials to keep confidential do not suffice to state a claim under 1983.

See, the material itself has to warrant constitutional protection, and, of course, you know, in our case we allege that the diary of Kathy Sheets was not entitled to constitutional protection at the time it was turned over to the County Attorney's Office or at the time that—or at any other time.

THE COURT: Why not?

MS. MARLOWE: Let's see. I think there is a recent cases. There is the Sodahl versus Cook County. It's a '92 case that talks about Fourth Amendment protections for unreasonable searches and procedures. It says, if this is a protectable property right that arises from this Fourth Amendment protection.

We don't believe, in this case, there has been a seizure. Mr. Sheets turned the diary over voluntarily, and there was not a search, an unreasonable search. So, if the Court were to look at whether or not it was unreasonable under some Fourth Amendment privacy right, we would say that, you know, that you have to find there was no Fourth Amendment violation.

THE COURT: Okay. Do you want to talk about the Utah statutes?

[277] MS. MARLOWE: Yes, Your Honor. We filed a Motion in Limine for the reason that we believe that any violation of Mr. Sheets' constitutional rights has to stem—well, has to stem from a violation of some fundamental constitutional right, that he can't sue us based upon a claim that we somehow violated Utah statute, that the Utah statutes do not determine what the Federal constitutional rights of an individual are.

THE COURT: No. Just sitting with the Utah statute alone, just looking at the Utah statute and confining your examination to that, do you want to respond to the allegation that there is a private cause of action for the violation of the, then, Utah statute?

MS. MARLOWE: I am not aware of any state law, you know, decisions that say that a person can base a civil case on a—or a state civil cause of action on a criminal case, and when I—the issue has arisen—

THE COURT: There was a statute, was there not, at 6716-4 of the Utah Public Officers and Employees Ethics Act?

MS. MARLOWE: There is that.

THE COURT: And doesn't it say that no public officer or public employee shall disclose confidential information acquired by reason of his official position nor use such information for his or another private gain or benefit?

[278] MS. MARLOWE: Well, yes.

THE COURT: Doesn't it say that?

MS. MARLOWE: It does. And our position is, again, the diary was not confidential information. No one communicated any confidentiality request to us, I mean, all Mr. Sheets does, is—or all the evidence is that Farnsworth says that he had some discussion. He's unable to say he told anyone anything or this is what he did. My clients deny that anyone said anything. It was never stamped "confidential." There was no notation on it. There was nothing that said that anyone wanted us to protect it from public view.

And all public records, or all prosecutors' files, at some point in time, are open to the public, that after we archive something, after we are doing with the prosecution, that anyone is entitled to our files.

The Court will remember, from Wilcox, that he sued us—or the women sued Wilcox for molesting them when he was on duty as a highway patrol officer. And, I mean,

in a case like that, we could protect our files during the prosecution, but once it was over, the law is clear that someone is entitled to them. And this is the same type of case.

I mean, once the Hoffman murder was over, and we archived all our files and records—or ones that were not sensitive, and no personal notes, I guess, were stored—then any person had access. So, you know, whether someone in [279] the office inadvertently gave Mr. Lindsey access, you know, to diary information, or whether Mr. Lindsey went and looked at the copy in archives. I mean, we don't know whether or not he got it from some other source. And we don't know.

But the problem here is whether or not it was confidential. We believe that, you know, if anyone had a right of privacy, it was Kathy Sheets, and she died. It died with her. That diary belonged to her estate. It didn't belong to Gary Sheets. It wasn't personal to him. It had nothing to do with his privacy rights.

And the fact that, you know, the Court's concerned what alleged violation of state law, then, you know, plaintiff should have sued us for a violation of state law, as opposed to a violation of a Federal constitutional right, but the problem with that case, Your Honor, is the same as this one. Plaintiff has no evidence that my clients, you know, intentionally, deliberately, directly, you know, gave that diary information to Mr. Lindsey.

They want a jury to try and determine, from many possibilities, who most likely did it, and that's not sufficient evidence of probable cause. They have to show that someone was the legal cause of the publication in that book, and plaintiff is unable to make that showing of probable cause.

That, coupled with the fact, that whatever is [280] published in the book, does not invade any constitutional rights of privacy possessed by Gary Sheets.

THE COURT: Mr. Linebaugh?

MR. LINEBAUGH: Thank you, Your Honor. Counsel makes the point, first, that Mr. Sheets had no reasonable expectation of privacy, and she says that's because they were in the public eye. There is absolutely no evidence that this diary was in the public eye, absolutely none. And with respect to his expectation of privacy, I defy anyone to read that diary, as this jury is going to be permitted to do, and even begin to conclude, as Mr. George did on the stand, that he saw nothing in there, after studying it, that would indicate it ought to be kept confidential.

That diary is full of material that ought to be kept confidential. And I defy anybody to read it and conclude otherwise. That is a jury question, for the jury to decide whether he had a reasonable expectation.

Counsel states the law correctly, from the Tenth Circuit. In the Slaton case the law is very, very clear, according to Slaton, that as long as he has a reasonable expectation of privacy and that expectation outweighs any government reason for turning it loose—of which there is none—then he has a cause of action. And it's up to the jury to decide, then, whether his privacy was violated.

So, we have, clearly, a jury question on whether he [281] had a reasonable expectation of privacy and whether it outweighed any government purpose for turning the diary loose. And that is clearly a jury question.

She also, then, retreats from that position and resorts to the wrong standard, entirely, as to whether he has a constitutional right, and where she says that there is no public ridicule or defamation; and, therefore, his privacy is not invaded.

This is not a defamation case. It wouldn't matter if he is publicly riduculed or not. This is a case of whether his privacy and his sensibilities have been violated by virtue of what was done; regardless of whether he's a public figure, regardless of whether the whole world thinks he's a great guy or a Charles Manson or whatever. It doesn't make any difference. The point is whether his privacy

was violated, regardless of whether or not there is any public disclaimer or acrimony or criticism of him.

And as I say, she does state the law correctly in Slaton, but Slaton doesn't talk in terms of whether or not he's publicly ridiculed or not. Its a question of whether or not he had an expectation, from that material, that it be kept private, and that's the issue.

There is the further, very strong case in point, Your Honor, in addition to the Slaton case the Fajo, F-a-j-o, versus Coon, C-o-o-n, which is a Fifth Circuit case in 1981, [282] wherein it was held that there were constitutional rights to privacy and freedom of speech, and violation of these basic constitutional rights, in a case where the plaintiff had adequately alleged deprivation of constitutional right to privacy in view of allegations that, although subject to subpoena, plaintiff revealed private details of his life to State's Attorney on assurance's that such was absolutely privileged and would be revealed to no one.

And contrary to such promises, the state revealed information for credit investigators, who, in turn, revealed it to the insureds. Here we have the affirmative promise Mr. Farnsworth testified about. We have the reasonable expectation that the plaintiff testified about. We have the testimony of Mr. Bell, that he certainly didn't tell them that they would be papering the town with pages of his wife's diary.

All of this, we think, creates a jury question of whether Mr. Sheets had a reasonable expectation of privacy, when he turned that over to Mr. Bell; albeit, whether it was a privacy to be protected by the city or a privacy to be protected by the county.

The next point she made is that there is no proximate cause. Clearly, this is a circumstantial evidence case. We don't have Mr. Lindsey coming to the fore and saying, "Yeah, by golly, I remember how this happened. And [283] Mike George gave it to me."

What we have Mr. Lindsey saying a hundred times—in spite of the fact we kept after him and kept after him—he says, "I can't remember. I can't remember, finally, when pressed, and finally when confronted with documents he, in turn, had personally written, he finally had to confess, "Well, yeah, my memeory is refreshed now, and at least I gave it to detectives."

Now, having gone that far, let's eliminate all these other peopule they are thinking may have been possibilities. And counsel has suggested everybody in the world that may have had a chance to reveal the diary. It really boils down to three people, and it boils down to one of them being Ted Cannon, who counsel's own client says, "I didn't do it."

It boils down to Ken Farnsworth, who categorically denies he did it. But you've then got Mr. George with what's known as a soft confession. Instead of saying, "I don't remember," Mr. George says, "I don't know, but I might have."

Now, that is circumstantial evidence, but let's not kid ourselves. Those circumstances combine to indicate that Mr. George was the one that let out the diary information, because there is no one else possible, given all the testimony we have. It all points to Mr. George.

And they are good friends. Mr. Lindsey doesn't [284] want to dump on Mr. George, and Mr. George surely didn't want to dumb on Mr. Lindsey. He wants Mr. Lindsey to say, "I don't know." They are good enough friends. They would have protected each other.

I don't know whether they are lying or not. I don't have to prove they are lying. I have to create a jury question that, given all the circumstances of this case, the evidence points to the fact: Yes, Mike George did it. And not only did he do it, he did it pursuant to a policy that was adopted by the county which was contrary to state law.

Now, on that matter of state law, Your Honor, that only comes into play in this case—and the reason we

haven't put on anything about it in our case-in-chief is, it only comes into play if in fact they are going to put on some sort of defense that these people had some sort of good faith immunity, because even though what they did was wrong, they did it in good faith.

And that only comes into play there, and that's why it has not been introduced in the case yet, because we have not sued that they violated that law, at least we certainly don't represent that to you today.

We are here on constitutional violations of the United States Constitution, even though what they did violated that very state provision that Your Honor last alluded to. But we, in a Section 1983 claim, are not [285] relying, and we can't rely on that state statute as evidence of a violation of the 1983 claim, unless they want to raise the good faith defense, which I think they are going to have a very difficult time doing.

She has also kind of commented, during the course of her argument, with words like it was "inadvertently" done or "without intention." Absolutely irrelevant. It's got nothing to do with anything here. We don't have to prove that they intended to hurt Mr. Sheets.

We simply have to prove that they did it; that they in fact gave out the diary information, they in fact adopted the policy that allowed it to be disseminated, and, therefore, both individual defendants and the county are liable, and there are jury questions on those issues. Thank you, Your Honor.

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[299]

SALT LAKE CITY, UTAH
WEDNESDAY, MARCH 10, 1993

* * * *

THE COURT: Note that counsel is present. Parties are present.

Prior to dealing with pending motions, I wanted to clarify a couple things. Obviously in dealing with 1983, we're talking about people acting under color of state law. It seems pretty obvious. There's no genuine contest on that, is there?

MS. MARLOWE: No, your Honor.

THE COURT: Secondly, in dealing with the concept of privacy as enunciated in Slayton and, indeed, in the Nicks on case, there's suggestion as to the application of a balancing test where theoretically the privacy interest is balanced against some so-called public interest capable of articulation. I'm interested in having the defendants through counsel tell me if they've identified any public interest that they put as a counterweight to the so-called private interest.

MS. MARLOWE: Well, it's public interest in the dissemination of information gathered for prosecution that all persons within the community are interested in how a crime was solved and what type of evidence was in possession of authority. And the problem in this case, your Honor, is not so much we think a balancing test, it's a fact that this [300] diary which plaintiffs claimed released and quoted from or at least excerpts were released and quoted from do not involve private sensitive matters that are talked about in Slayton. So you never get to balancing Ms. Sheets—

THE COURT: I want to be clear, because I'm in the process of dealing, one, with your motion initially, and if need be thereafter. Are you telling me that you're not asserting any kind of a counter balance for the so-called privacy interest as far as the public is concerned?

MS. MARLOWE: Well, no. We believe the public had a right to know.

THE COURT: Tell me what your public interest is that you say is the counter balance to the so-called privacy interest. Why don't you tell me as simply as you can.

MS. MARLOWE: Okay. Mrs. Sheets was a victim of a horrible crime. She was a victim in place of Mr. Sheets. There was great public empathy and sympathy I think about her death, okay. And that concern about her death and her murder, her unfortunate murder continued. And it arose again in conjunction with Mr. Sheets', you know, fraud problems, the ongoing investigation and all the other stuff. She and her husband remained in the public eye. And there was lots of interest generated by the press and by the public in what Mark Hoffman did and who he defrauded and why he killed these two people. And that's why we think there [301] was some interest on behalf of the public to know.

THE COURT: Well, does the public have the right to know confidential matters?

MS. MARLOWE: Well, we assert they're not confidential. But if they are, they belong to Kathy Sheets.

THE COURT: Well, we're not concerned with the proprietorship question. We're not concerned with that. We're concerned with information that purportedly is disclosed in reference to the party plaintiff. You have to distinguish, it seems to me, between proprietorship and information which is if private, private.

MS. MARLOWE: Well, okay. Okay. Yesterday Mr. Sheets says that what he objects to is not what authors may have said about him and his deceased wife and he doesn't care what Lindsey may have written. He objects to the quotes from the diary. And he doesn't care about the substance of the quotes. So all he's saying is that we allowed Lindsey to misuse or to quote from the diary. He doesn't say that what's quoted is offensive to him or invades his privacy. He complains about a violation of some possessory interest in this diary.

THE COURT: As I understand your argument, then, you say that there's some kind of a public need to know confidential material.

MS. MARLOWE: Well, no. I'm saying it's not [302] confidential. Just it came—

THE COURT: Assuming it's confidential, assuming that it's confidential, then your argument is the public needs to know confidential material. And the query then becomes why?

MS. MARLOWE: Because of the notoriety of the crime, public's continuing interest in Mr. Sheets and everything about Mr. Sheets. He never left public—He never left the public's eye. There's a newspaper—

THE COURT: The mere fact that somebody is in the public eye, to use your words, in and of itself doesn't justify the disclosure of confidential information. The mere fact that somebody has some degree of public recognition doesn't mean that an officer who may have confidential material for use in a public function has any basis found in the so-called need to know to disclose it.

MS. MARLOWE: Well, if Mr. Sheets is in a position of public notoriety, okay, then the public has an interest in knowing about him and all things connected with him. I mean, his wife's murdered in his place. There's continuing public interest in Kathy Sheets and her life.

THE COURT: The fact that people have had horrible experience doesn't mean that their life from the beginning of conception until death is to be laid out on the public platform. That's an argument that seems to me flies in the [303] face of Slayton and the privacy interest that Slayton says people have assuming the existence of privacy interest. And the question as to the nature of the interest is it seems to me a factual question in matters of this kind.

MS. MARLOWE: Well, if he says the substance of the quotes don't bother him, and they don't offend him—

THE COURT: That's something you can argue, I

suppose, to the jury. But that doesn't deal with the legal proposition.

Okay. Well, I think that I understand what you're suggesting by way of a counter weight. It isn't much of a counter weight at this point. Secondly, we cleared up the under color of state law routine.

MS. MARLOWE: I have a question for the Court. I mean, we think we're entitled to show as part of our defense in this case the fact that all the information or all the quotes that Mr. Lindsey used were already in the public forum.

THE COURT: Well, I'll deal with questions of evidence when we get to that point—

MS. MARLOWE: Well—

THE COURT: —I think in reference to your motion.

MS. MARLOWE: Well, at the same time, you know, if you want to allow the proffer we can save time.

THE COURT: Let's deal with the motions at this point. [304] And in reference to the motions that you made, I'm going to deny your motion. * * *

* * * *

[213] Q. Did Mr. Farnsworth ever tell you, during the course of any meetings, that he promised Mr. Sheets that Kathleen Sheet's diary would be kept confidential?

A. [Mr. George] No, he did not.

Q. Did anyone say anything to you at any time about keeping that diary confidential?

A. No, they did not.

* * * *